CERTIFICATE OF GOOD FAITH

Petitioner hereby certifies that Petitioner's Brief For Rehearing is presented in good faith and not for delay. She further certifies that the Petition for Rehearing is restricted to one question; namely, IS A FEDERAL COURT AT THE APPELLATE LEVEL EMPOWERED TO SUBSTITUTE ITSELF FOR A JURY AND RULE UPON FINDINGS OF FACT? and that this question was not presented to the Court in her Petition For Certiorari.

MARTI POGUE

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-672

MARTI POGUE,

Petitioner,

vs.

RETAIL CREDIT COMPANY,

Respondent.

From the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S BRIEF FOR REHEARING

MARTI POGUE, In Proper Person comes before the Supreme Court of the United States and respectfully requests it to reconsider her Petition for Certiorari in the case of *Marti Pogue v. Retail Credit Co.*, Supreme Court Case No. 72-672, and in making this request she asks this

court to address itself to and make a determination on but one question; namely, IS A FEDERAL COURT AT THE APPELLATE LEVEL EMPOWERED TO SUBSTITUTE ITSELF FOR A JURY AND RULE UPON FINDINGS OF FACT?

If the answer to this question is affirmative Petitioner respectfully asks that this Court issue an Opinion to that effect, citing the legal basis for its ruling; if however, the answer to this question is negative it is imperative that Petitioner's request for certiorari be granted as to rule otherwise would be to trespass upon her right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States of America.

Petitioner says that she did not raise this issue in her Petition for Certiorari by virtue of the fact that she considered the answer obvious—that a federal appellate court *cannot** substitute itself for a jury and rule upon findings of fact—and that to argue this question before the learned justices of this Court would have been unworthy and an insult to the intelligence of the Court. Now, however, Petitioner questions the wisdom of her decision, particularly in light of this Court's recent decision in *Davis v. McKeithen*, Supreme Court Case No. 72-660, and by virtue of the fact that by allowing the ruling of the lower court in her case to remain uncorrected, it has in effect ruled that a *federal court* at the appellate level *is* empowered to substitute itself for a jury and *can* rule upon findings of fact, for that is exactly what the United States Court of Appeals for the Fourth Circuit did when it made findings of fact on an issue not on appeal and said in its published Opinion:

*Emphasis supplied by author unless otherwise noted.

> "Perhaps appellant met this burden on the question of Retail Credit's negligence in preparing the report. But in order to support an action of deceit, she must also prove reliance, and on that issue she did not meet the test. 37 Am. Jur. 2d *Fraud and Deceit* §223 (1968). Petitioner testified that when she sought additional loans she relied on the fact that the report divulged no additional information detrimental to Walker & Townsend. She also testified that she might even have prevented the transfer of her stocks under the initial power of attorney, even through she had committed herself. Nonetheless, we find that the trial court was correct in directing a verdict for Retail Credit. Despite Miss Pogue's testimony, an objective evaluation of the reports published by Retail Credit indicates that they contain no information on which an experienced businesswoman might reasonably rely . . ."

It is evident from this statement that Petitioner had met the burden of proof on the question of Retail Credit's negligence in preparing the report and that in ruling to the contrary the trial court, below, erred and properly, the Appeals Court should have remanded the case back to the trial court with instructions to grant a new trial. However, Petitioner respectfully says to this Court that *the Appeals Court did not act properly and did not remand* the case back to the lower court with instructions to grant a new trial; instead, *that court raised an issue not on appeal*, namely, whether or not Petitioner had acted reasonably in relying on the Retail Credit report. Then, that court proceeded, on its own initiative, to make a determination of fact on the issue which it had itself raised and in

so doing, transgressed upon Petitioner's constitutional right to a trial by jury. As set forth by Justice White, in expressing this Court's majority opinion in *Gallick v. Baltimore and Ohio Railroad Co.* (1963), 372 U.S. 108, 9 L.Ed. 2d 618, 83 S.Ct. 659 when it granted certiorari and reversed the decision of the Ohio Supreme Court:

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.[1] *That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored.*"

What the Court of Appeals did in Petitioner's case was to rule upon the *reasonableness of her conduct* in relying upon the Retail Credit report and Petitioner directs this Court's attention to 53 Am. Jur. (1945) §198, page 168 on *Reasonableness:*

> "Ordinarily, an issue as to the reasonableness of anything is regarded as a mixed question of law and fact for the determination of the jury, and, is usually, therefore, a question to be determined by the jury. Reasonableness of fright or conduct, of a search or causing an arrest, or punishment inflicted upon a pupil, or opportunity

[1]See also *Washington & Georgetown R. Co. v. McDade*, 135 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co.*, supra 68; *Bailey v. Central Vermont Ry*, 319 U.S. 350, 353, 354.

to depart from a station, of rates, or the amount of a levy of the objection of an intoxicated person at a point where there is no available refuge from the cold, ordinarily are questions of fact for the jury."

In *Hanford v. Omaha & C.B. Ry. Co.* (1925), 203 N. W. 643 the court held that the reasonableness of fright caused by a street car collision and the subsequent conduct of plaintiff were questions of fact for determination by a jury. A footnote to 53 Am. Jur. (1945) §156, at page 141, stresses this point emphatically:

> *"In the absence of the jury the judge has no jurisdiction to sit as a substitute for it and perform its function and if he attempts to do so his actions are void."*

The one exception to the right of a jury to make a determination as to the reasonableness of anything is when the jury seeks to rule upon the reasonableness of a law. See *Roberts v. Fuquay-Varina Tobacco Board of Trade, Inc., et al* (1963), 223 F. Supp. 212. In this action the court quite properly held that the "reasonableness of a new regulation [law] adopted by tobacco board of trade and whether regulations constituted an unlawful restraint of trade were not questions of fact but of law for the court." *Sherman Anti-Trust Act*, §1 *et seq.*, 15 *U.S.C.A.* §12 *et seq.*

Obviously, Petitioner's case does not involve the reasonableness of a law; instead, her case involves a finding of the *reasonableness of her conduct and as such is subject to jury determination.* Further, she says to this Court that

under Federal Rules of Civil Procedure 50(a), a rule which Justices Black and Douglas have called, "the process by which the courts have been wrestling from juries the power to render verdicts",[2] the trial court took the case from the jury and rendered a directed verdict in favor of Retail Credit. Therefore, Petitioner did not wave her right to have this matter determined by a jury; furthermore, the question of whether or not she acted in a reasonable manner by relying upon the credit reports prepared by Retail Credit was an issue raised by neither the plaintiff nor the defendant, but was an issue raised by the Appeals Court itself.

Petitioner is cognizant of the fact that during the week of January 9, 1973, in *Davis v. McKeithen*, Supreme Court Case No. 72-660 and 345 F. Supp. 1025 (1972), this Court held that a jury's findings of fact in a civil suit can be overturned by *state* appellate courts and issued a brief order affirming the decision by a special three-judge federal panel upholding the practice under Louisiana law. This ruling not only allows findings of fact by a jury to be set aside, but also, empowers state appellate courts to decide findings of fact. However, Petitioner respectfully reminds this Court that *Davis supra* was a ruling in regard to the actions of a state appellate court while her action deals with a matter tried in federal court and therefore, must be dealt with in the manner outlined in 47 Am. Jur. 2d (1969) §40, page 658, *Actions in Federal Courts:*

> "The Federal Constitution guarantees a trial by jury in civil cases as well as criminal cases in

[2]Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and Proposed Amendments, 374 U.S. 868, 83 S.Ct. 43, 9 L.Ed.2d lxv, lxvi. (1963)

the federal courts and it is provided by statute in all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."

While Petitioner does not necessarily agree with the spirit of the decision in *Davis supra*, her personal views being in sympathy with those of the lower court's dissenting opinion expressed by Judge E. Gordon West, she does understand the legal principles on which the majority decision was founded and, in turn, why the Supreme Court upheld that opinion and affirmed the lower court's majority decision. These principles are set forth in 47 Am. Jur. 2d (1969) §9 and §10, pages 632-634:

"The Federal Constitution does not in any place expressly guarantee the right of trial by jury in any state court in any character of case . . . Rights under state law cannot be enforced in federal courts in conflict with the right to jury trial under the Federal Constitution . . . There is authority that the Federal Constitutional provisions guaranteeing that the trial of all crimes except in cases of impeachment, shall be by jury of the state and district wherein the crime shall have been committed, and that suits at common law where the value in controversy exceeds $20.00, the right of trial by jury shall be preserved, *applies only to the Federal Government* and not to state governments, and do not limit the power of the state government to abolish, modify, or alter trial by jury even in a suit in a state court to enforce a right under federal law.

> The public policy of the state with respect to jury trials is determined by its own constitution. The right of trial by jury is a subject of general legislation, and laws affecting it are subject to a constitutional provision that general legislation must operate uniformly throughout the state."

However, Petitioner says that in regard to actions tried in federal court the United States Constitution has sole jurisdiction and that every action must be tried in accordance with its provisions and she quotes from the Seventh Amendment to the Constitution:

> "*Right of Trial by Jury.* In suits at common law, where the value in controversy shall exceed twenty-dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

Rule 38 of the Federal Rules of Civil Procedure amplifies further the Seventh Amendment:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

The importance of the principles contained in the Seventh Amendment was recognized by the United States Supreme Court in *Chicago, B. & O. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), when it said:

> "One of the objections made to the acceptance of the constitution as it came from the hands of the convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that, under it, facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of the common law. The Seventh Amendment was intended to meet those objections and to deprive the courts of the United States of any such authority."

As Judge E. Gordon West held forth in his dissenting opinion in *Davis v. McKeithen:*

> "... Amendment Number Seven, which guarantees the right to jury trial in civil cases ...specifically *precludes appellate courts from examining*, other than according to the rules of common law, *facts found by the jury* ... To conclude, by whatever reasoning adopted, that the right to trial by jury in civil cases, with the findings of fact of the jury being considered final except as otherwise provided by common law concepts, is not and has not always been considered a fundamental right by the American people, is simply to defy history."

If, in accordance with the provisions of the Seventh Amendment, appellate courts are precluded from re-examining facts found by a jury does this same amendment not also *preclude appellate courts from making findings of fact on issues which were not presented to the*

jury for determination? 53 Am. Jur. (1945) §156, page 141 is quite clear on this subject:

> "In cases tried by a jury the court and jury each have, under our system of jurisprudence, separate and distinct functions . . . *It is the province of the court*—the trial judge—*to determine and decide questions or law* presented at the trial, and to state the law to the jury, and *the province of the jury to decide and determine the facts of the case* from the evidence adduced in accordance with the instructions given by the court, and it is the policy of our law to protect the province of the jury from invasion by the courts. To dispense with either court or jury, or to permit one to disregard the province of the other, is to impringe on the right to a jury trial. It is for the court in every case to say what is the law and to determine questions of law arising therein in whatever form presented, and to direct the application of the law to the facts of the case. *It is for the jury to determine or decide disputed claims and questions of fact arising in the case before it . . .*"

Id. §158 and §159 at pages 143 and 144 says on *Questions of fact:*

> "In a case being tried by a jury the court should not undertake to pass on and decide issues of fact. The jury's function has as definite sanction as that of the court. *The controlling functions of a jury are to pronounce on the credibility of*

witnesses; to determine disputed facts; to draw conclusions from doubtful and contradictory premises; and to admeasure damages where the law has afforded no standard. It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence.

In jury trial cases it is the sole peculiar province and function of the jury to determine and decide disputed claims and questions of fact arising in the case before it, and the law does not countenance any invasion or usurpation by the court of this province and function of the jury to weigh the evidence and find the facts. The jury has the right to draw from the proved circumstances such conclusions as are natural and reasonable."

Once again Petitioner alludes to *Davis v. McKeithen* and the dissenting opinion of Judge E. Gordon West wherein he states:

"The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. The Judiciary Act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for

reasons for which new trials have usually been granted in the courts of the law.' And the appellate jurisdiction has also been amply given by the same act, (sec. 22, 24) to this court to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury . . . The fact that there are means, at common law, for reviewing finding of fact, in no way diminishes the fundamental nature of the right to trial by jury in civil cases. The fact that there does exist such means of reviewing facts under certain circumstances simply gives meaning to the language of the Seventh Amendment when it says that no fact tried by a jury shall be otherwise re-examined in any court of the United States *than according to the rules of the common law.* (Emphasis included). These 'rules of comon law' *do not include a rule . . . which permits an appellate court to substitute its own finding of fact for those of the jury . . .*"

CONCLUSION

In conclusion, Petitioner respectfully says to this Court that the decision in *Pogue v. Retail Credit Co.*, 453 F.2d 336 (1972), is not correct and it is imperative that certiorari be granted to correct this decision by virtue of the fact that if it is not corrected both the spirit and the intent of the Seventh Amendment to the Constitution of the United States will be violated; in addition, a contradiction in the law will exist as to what is the province of the jury and what is the province of the court, as the lower court's ruling clearly does not conform to the law as set forth in recognized law textbooks and accepted references of authority on jurisprudence. Petitioner further says, that if this ruling is left uncorrected, confusion, error and unnecessary litigation will be created for years to come as it will incorporate into the law a legal prescedent which is clearly unconstitutional.

Dated this ____ day of February, 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief for Rehearing was mailed to the following addressee this _____ day of February, 1973.

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